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May 3, 2004

Ex Parte

Marlene F. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: **Appropriate Framework for Broadband Access to the Internet over Wireline Facilities CC Docket No. 02-33, Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements WC 02-112, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services CC Docket No. 01-337, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers CC Docket No. 01-338, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities CC Docket No. 02-52**

Dear Ms. Dortch:

Verizon is providing the attached in response to AT&T's April 15, 2004 *ex parte* letter from David Lawson, Sidley Austin Brown & Wood, LLP, in opposition to Verizon's petition for forbearance from any stand-alone section 271 unbundling requirements.

If you have any questions regarding this matter, please call me 202 515-2529.

Sincerely,

Dee May

Attachment

cc: Austin Schlick
Linda Kinney
John Stanley
Jeff Dygert
Michelle Carey
Tom Navin
Pamela Arluk
Trey Hanbury
Paula Silberthau
Debra Weiner

VERIZON'S PETITION FOR FORBEARANCE FROM ANY SECTION 271 UNBUNDLING OBLIGATIONS FOR BROADBAND SHOULD BE GRANTED AND THE ARGUMENTS IN AT&T'S APRIL 15, 2004 *EX PARTE* ARE WITHOUT MERIT

1. AT&T devotes much of its latest *ex parte* to rehashing the same time-worn legal arguments it has presented now for several months. Verizon exhaustively responded to those arguments in its March 26, 2004 *ex parte*,[1] and it will not repeat that discussion in full. Several points warrant emphasis, however.

First, as in its previous filings, AT&T argues that the *Triennial Review Order's* limited impairment finding for hybrid loops bars satisfaction of section 10(a)(1) and is thus "the end of the issue." AT&T *Ex Parte* at 2. This is flatly wrong in several independent respects. To begin with, AT&T's argument addresses only hybrid loops, and does not even purport to address the other broadband elements as to which forbearance is sought, including fiber-to-the-premises ("FTTP") loops and packet switching. In each case, the Commission found no impairment at all. Indeed, it would be particularly perverse to force Verizon to share its multi-billion dollar investment in FTTP facilities with CLECs, given that it "do[es] not have a first-mover advantage" over them and that, in fact, "competitive LECs are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation."[2] And, similarly, the Commission has found that CLECs have

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[1] *Ex Parte* Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 01-338 (Mar. 26, 2004) ("Verizon *Ex Parte*").

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17143 ¶ 275 ("*Triennial Review Order*").

deployed "extensive, nationwide networks" for frame relay and ATM and "lead incumbent LECs in the deployment of Gigabit Ethernet switches." *Triennial Review Order* at 17321 ¶ 538.

Second, even with respect to hybrid loops, AT&T grossly distorts the *Triennial Review Order's* findings on the impairment issue. The *Order* squarely rejects AT&T's position "that, without unbundled access to hybrid loops, competitive LECs will not be able to serve certain customers," finding that "competitive LECs retain alternative methods of accessing loop facilities in hybrid loop situations," and thus have "a range of options for providing broadband capabilities." *Triennial Review Order* at 17151 ¶ 291. The Commission found that the availability of these alternatives "adequately addresses" whatever limited impairment the CLECs otherwise may face without access to hybrid loops. *Id.*; *see also* FCC Br. in *USTA II*, No. 00-1012, at 50 (D.C. Cir. filed Dec. 31, 2003). And the D.C. Circuit upheld the Commission's findings on this very point, noting that any "impairment from competitors' lack of unbundled access to hybrid loops . . . 'at least partially diminishes with the increasing deployment of fiber,' and that unbundled access to copper subloops 'adequately addresses' that impairment."[3]

Third, even if the Commission had made an unqualified "impairment" finding with respect to hybrid loops, which it did not, it would still be more than appropriate to forbear from any obligation to unbundle those loops. As the D.C. Circuit has made clear, *see USTA II* at 580, "impairment" is merely the "touchstone" even under section

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[3] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004) ("*USTA II*") (quoting *Triennial Review Order* at 17148 ¶¶ 286, 291).

251(d)(2), and an impairment finding is thus even less dispositive under section 10(a), which contains neither that term nor any similar concept. AT&T is therefore wrong in claiming that, by taking due account of the broadband deployment goals of section 706, Verizon's position would require the Commission to negate individual requirements of section 10(a). To the contrary, it would simply require the Commission to account for those goals in conducting each of the separate analyses required by that provision.

Nowhere is it more appropriate to take account of section 706 than with respect to the analysis required by section 10(a)(1). As Verizon explained in its March 26 *ex parte*, the 1996 Act was enacted to promote competition generally for the benefit of consumers, not, as AT&T supposes, to protect the parochial interests of particular competitors. The ultimate question under section 10(a)(1) is thus whether, after forbearance, the services provided to consumers will be offered at just and reasonable terms and conditions. Although the terms and conditions of particular wholesale products may be relevant to that inquiry, this is true only to the extent that they affect the rates ultimately charged to consumers. As the Commission has repeatedly found, including in the forbearance context, the best means of promoting consumer welfare in the long term is to take the steps needed to promote facilities-based broadband competition, as section 706 independently directs.[4] Here, as we previously have shown at some length and briefly address below, the evidence overwhelmingly shows that market forces—and, in

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[4] *See* Memorandum Opinion & Order, *Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 21086, 1999 WL 759698, ¶ 31 (1999) (*"US West NDA Order"*) (finding that, for purposes of section 10(a)(1) "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory").

particular, existing intermodal competition—have in fact produced competitive rates and will continue to do so.[5] And, of course, if matters were to change in the future and if the Commission were presented with evidence of a demonstrated market failure, it could step in to address the matter. But it should not regulate anticipatorily, particularly where the evidence demonstrates that the market is working.[6]

Fourth, there is no legal or economic basis for AT&T's claim that forbearance, however necessary to protect the consumer interest in greater intermodal competition, is impermissible until the Commission makes various findings about the state of "wholesale competition" for broadband transport. AT&T *Ex Parte* at 2. As an initial matter, the Commission rejected this very claim when it removed these elements from the section 251 unbundling list to begin with. The claim carries even less weight under section 10, which nowhere mentions "wholesale competition," than under section 251(d)(2), which focuses on "impairment" to would-be wholesale purchasers.[7] In all events, as Verizon

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[5] *See, e.g.,* Verizon *Ex Parte* at 20-22, 24-32; *See Broadband Competition: Recent Developments, March 2004* at 8, attached to Verizon *Ex Parte* ("*March 2004 Broadband Update*"); *see also* J. Halpern, *et al.*, Bernstein Research Call, *Broadband Update: DSL Share Reaches 40% of Net Adds in 4Q . . . Overall Growth Remains Robust* at 6 (Mar. 10, 2004) ("*March 2004 Bernstein Report*").

[6] Remarks of Michael K. Powell, Chairman, FCC at the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," p. 4 (Feb. 8, 2004) (observing that, because government regulation is a "fundamental intrusion on free markets and potentially destructive, particularly where innovation and experimentation are hallmarks of an emerging market[,] . . . [s]uch interference should be undertaken only where there is weighty and extensive evidence of abuse.")

[7] There is no merit to AT&T's wordplay with the language of section 10(a)(1). Facilities unbundling is not a "telecommunications service." Instead, Verizon asks "the Commission [to] forbear from applying" any broadband unbundling requirement "to a telecommunications carrier"—Verizon—because "enforcement of such regulation . . . is not necessary to ensure that the charges, practices, classifications, or regulations by, for,

has demonstrated, "it is economically inappropriate to define a separate market that consists of 'wholesale DSL transport services provided to independent ISPs,'" given the "competition from other technologies which constrain the price of retail services."[8]

At bottom, AT&T's contrary interpretation would hamstring the Commission in the exercise of its forbearance authority in a broad variety of contexts and, more specifically, would preclude the Commission from using that authority to relax unbundling obligations after it finds that they harm the public. AT&T *Ex Parte* at 2. Congress did not intend that absurd result, and it would disserve the Commission's institutional interests to conclude otherwise.

Fifth, even if it *were* appropriate to focus on the effects of forbearance on the "wholesale market," which it is not, the issue here is not whether Verizon will be required to provide access on a wholesale basis or the terms for such access. The Commission is addressing those issues in other proceedings where it is considering the appropriate regulatory classification of broadband services and what regulatory obligations should attach to those services. The issue here is whether Verizon should be required to *unbundle* broadband network elements. A decision on that issue will not

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or in connection with that telecommunications carrier . . . are just and reasonable." Here, regulation is entirely unnecessary to ensure that Verizon's broadband offerings to consumers are just and reasonable, because fierce intermodal competition from cable companies and others already more than ensures that result. And nothing in the language of section 10(a)(1) compels Verizon to go on unbundling particular facilities to serve the narrow corporate interests of AT&T after the Commission has determined that continued enforcement of such obligations defeats the interests of consumers more generally.

[8] Supplemental Declaration of Dennis W. Carlton and Hal S. Sider, at 5 (Sept. 3, 2003) (emphasis omitted) (attached to Letter from Ann Berkowitz to Marlene Dortch, FCC, WC Docket No. 01-338, March 22, 2004).

affect the other obligations that today apply to local telephone companies—and only local telephone companies—and that are being examined in other proceedings. For example, the Commission's *Computer Inquiries* orders have been applied to require local telephone companies to offer their broadband transmission services separately and under tariff on just and reasonable terms. There is thus no merit to AT&T's claim that, absent 271 unbundling obligations, "Verizon would have the ability to charge supracompetitive prices for wholesale access to broadband loops—or deny access altogether." AT&T *Ex Parte* at 2. Verizon today remains subject to a wide range of regulatory requirements, including the obligation to offer transmission components of its broadband services separately, under tariff, at regulated rates. To be sure, Verizon believes that those additional obligations also should be removed as both unnecessary and counterproductive. If and when the Commission relaxes or eliminates those obligations, however, it will do so only upon finding that those obligations are unnecessary, and that determination will be made separately from the issue here.

Finally, in determining whether the individual criteria of section 10(a) are satisfied, the FCC has ample authority to take a broad view of what will best ensure reasonable rates and protect the interests of consumers over the long run. For example, the Commission has expressly found that short-term effects do not bar forbearance where, "on balance, the pro-consumer benefits of [forbearance] . . . outweigh any potential competitive advantage that may accrue to [the carrier requesting forbearance]." *US West NDA Order* ¶ 44. Similarly, in *Consumer Electronics Association v. FCC*, 347 F.3d 291 (D.C. Cir. 2003), the D.C. Circuit upheld a Commission rule that required all televisions of a certain size to include a DTV tuner, even though this regulation would

require consumers who do not need these turners to bear some of "the cost of making the tuners more affordable," holding that this balancing of interests is "well within the authority of the responsible agency."[9] *Id.* at 301. As the D.C. Circuit observed in *USTA II*, even if "the Commission's judgment entails increasing consumer costs today in order to stimulate technological innovations" that may benefit consumers tomorrow, "there is nothing in the Act barring such trade-offs." *USTA II* at 581.

Likewise, the D.C. Circuit also has made clear that the Commission is entitled to take into account the benefits that will accrue in terms of fostering competition in "broader markets," *see id.*, 359 F.3d at 579 (internal quotation omitted), which of course will ensure reasonable rates and protect consumers in those broader markets as well. All evidence shows, in particular, that increased broadband deployment will bring much-needed competition to cable's core *video* market. As the General Accounting Office recently observed, "cable rates were approximately 15 percent lower in areas where a wire-based competitor was present. . . . Our interviews with cable operators also revealed that these companies generally lower rates and/or improve customer service where a

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[9] AT&T claims that Verizon's reference to *Consumer Electronics* is "badly misplaced" because that case does not involve the Commission's forbearance authority. AT&T *Ex Parte* at 4. This misses the point. Just as the Commission is entitled in the context of the All Channel Receiver Act to impose some costs in the short term on consumers who do not use digital tuners in order to bring those tuners to "the market in quantity and at reasonable prices" over the long term, *Consumer Electronics* at 301, the Commission is entitled to determine that the elimination of broadband unbundling obligations will best ensure just and reasonable prices for consumers over the long run and thereby serve the objectives of the 1996 Act—which, as section 706 makes clear, includes "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . regulatory forbearance." Indeed, as discussed in the text, the Commission properly took that long-run view of its forbearance authority in the *US West NDA Order* (at ¶ 44).

wire-based competitor is present."[10] Nonetheless, GAO added, these consumer benefits are still quite limited precisely because "very few markets—about 2 percent—have been found to have effective competition based on the presence of a wire-based competitor."[11] Here, too, section 706 directs the Commission to tailor its regulatory policies to preserve the incentives of ILECs to build the facilities needed to bring price-lowering competition and greater product variety to this video market. Indeed, section 706(c)(1) cites the deployment of "video telecommunications using any technology" as a central policy objective. It would turn the 1996 Act upside down to deprive consumers of greater video competition simply to advance AT&T's corporate interests.

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[10] General Accounting Office, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, at 10 (Oct. 2003).

[11] *Id.* at 9; *see also* Mark Heinzl, "Battling the Cable Guy," Wall St. J., April 29, 2004, at B1 ("New voice-over-Internet-protocol (VOIP) technology is allowing cable-TV companies to eat into phone companies' bread and butter by rolling out inexpensive voice services, which they can package with existing TV and high-speed Internet services. Desperate to fight back with their own bundles, phone companies are scrambling to find ways of pushing into cable's mainstay: television."); J. Hodulik, et al., *Gallup Survey Highlights VoIP Potential: What Does the Consumer Want?*, UBS Investment Research at 2 (Apr. 8, 2004) ("The Bells are starting to roll-out video offerings . . . while the cable operators continue to deploy IP based telephony service . . . Both groups are encroaching on the cash cow business of the other, which likely means further consumer benefits are on the horizon.").

2. AT&T's factual analysis is as misguided as its legal analysis. First, AT&T rehashes its claim that ILECs are dominant in some aspect or another of the broadband mass market. *See* AT&T *Ex Parte* at 5. There is no plausible basis for that suggestion.

As Verizon has demonstrated, cable modem service is now available to 85 percent of U.S. households, and this figure is expected to rise to 90 percent by the end of 2004.[12] Cable companies still control approximately *two-thirds* of all high-speed lines provided to mass-market customers, and more customers still are subscribing to cable modem service each quarter than to DSL. *See March 2004 Broadband Update* at 1-2. This remained true not only throughout 2003, but also in the first quarter of 2004, despite significant price decreases by DSL providers.[13]

AT&T does not even attempt to contradict this evidence. Instead, AT&T speculates that there may be some "local" market in which the ILECs are the dominant broadband provider, but it fails to provide even a single example of where this might be the case. *See id.* In fact, JP Morgan estimated that no more than 5 percent of U.S. households would be able to receive DSL but not cable modem by the end of 2003.[14]

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[12] *See March 2004 Broadband Update*; *see also March 2004 Bernstein Report* at 6 ("Both cable and DSL will continue to expand availability during 2004, with Comcast alone adding almost 3.5 million homes passed.").

[13] *See, e.g.*, *March 2004 Bernstein Report* at 4; N. Gupta, *et al.*, Citigroup Smith Barney, *Cable MSOs Leaving a Lot of Food on the Table* at 1 (Apr. 28, 2004) (estimating that the RBOCs won 45% of new residential high-speed Internet subscribers during 1Q:04, compared to 55% for cable).

[14] *See March 2004 Broadband Update* at 2-3 (citing J. Bazinet, *et al.*, JP Morgan, *Broadband 2003* at Figure 9 (Dec. 5, 2002)).

The actual number may well be even lower today, given that JP Morgan assumed that cable modem service would be available to only 76 percent of all U.S. households as of year-end 2003, whereas the actual total today is somewhere between 85 and 90 percent.[15]

AT&T next suggests that ILECs are dominant in the provision of broadband to the small-business segment of the mass market. As Verizon has shown, however, both the March 2004 study commissioned by the Small Business Administration and two recent studies by In-Stat/MDR belie this claim. *See March 2004 Broadband Update* at 3-4. Indeed, both studies find that that cable modem service is now the broadband technology *most used* by small businesses. The Small Business Administration study, which the CLECs' own trade association has praised as a "well-researched report,"[16] separately analyzed small businesses according to three different segments (those with 0-4 employees, those with 5-9 employees, and those with revenues less than $200,000), and found that "for all three segments penetration was higher for cable modem service than for DSL." *March 2004 Broadband Update* at 4. A December 2003 study by In-Stat/MDR analyzes small businesses with 5 to 99 employees and finds that, as of year-end 2003, there were 2.1 million such businesses using cable modems compared to 1.4 million using DSL.[17] A November 2003 study by In-Stat/MDR finds that small offices

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[15] *See Broadband 2003* at 12, Fig. 9; *March 2004 Broadband Update* at 8 & n.32.

[16] ALTS Press Release, *ALTS Applauds SBA's Survey of Competition for Small Business Customers* (Mar. 11, 2004) (statement of ALTS president John D. Windhausen, Jr.).

[17] K. Burney, In-Stat/MDR, *The Data Nation: Wireline Data Services Spending and Broadband Usage in the US Business Market; Part Three: Small Businesses (5 to 99 Employees)* (Dec. 2003).

and home offices (businesses with fewer than 5 employees) subscribe to cable modem service more than twice as often as they subscribe to DSL.[18]

Thus, while AT&T claims that "Verizon provides no hard figures about actual cable modem penetration in local business markets, but instead relies primarily on *2002 predictions* from the Yankee Group (and others)," it is clear that AT&T has either failed to read Verizon's *ex parte* or prefers to ignore it.

In addition to ignoring the evidence that Verizon did supply, AT&T's claim that Verizon relied primarily on a 2002 Yankee Group report is simply false. Verizon cited that report for the proposition that "[f]ive of the six largest cable system operators . . . already offer broadband services specifically tailored to small business customers,"[19] not for evidence on the current (or projected) availability or penetration of cable modem services among small business customers. As a result, AT&T's claim that Verizon "fail[ed] to disclose" that a more recent Yankee Group report "has now concluded these [2002] predictions were . . . wildly optimistic" is just AT&T attacking its own straw man. In any event, the more recent Yankee Group report that AT&T cites merely states that cable modem has not, contrary to earlier projections, "*surpass*[*ed*]" DSL with respect to small business customers with between 20 and 99 people. But whether cable has surpassed DSL for this sub-submarket is a very different issue from whether cable provides a significant competitive alternative for these customers. And, as the more

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[18] *See* K. Burney & C. Nelson, In-Stat/MDR, *The Business Hot Wire!: Data Access in the Commercial and Residential Environments of US Businesses; Part One: Cable Modem Services* at 20, Table 11 (Nov. 2003) (48.5% of SOHO businesses subscribe to cable modem; 17.8 percent subscribe to DSL).

[19] Verizon *Ex Parte* at 24 & n.31; *see* AT&T *Ex Parte* at 5 & n.22 (citing same).

recent Yankee Group study finds, it clearly does. It shows that DSL's share of these customers is less than 6 percentage points higher than cable's, and predicts that, "[b]y 2008, cable will gain share . . . closing the wide gap between the two broadband media."[20] Moreover, with respect to smaller businesses—those with fewer than 10 employees—the same study reiterates earlier findings that "cable modem and DSL maintained an equal share" of the market and that "cable operators have been extremely successful in serving businesses with 10 people or less." *Feb. 2004 Yankee Group Study* at 6.

Unable to rebut the fact that cable modem service is widely available and widely used in all segments of the broadband mass market, AT&T claims that this competition merely proves that there is a "cozy duopoly" that is "insufficient to produce competitive outcomes." AT&T *Ex Parte* at 5-6. But here, too, AT&T is long on rhetoric and short on facts.

There is no plausible argument that removing any vestigial unbundling obligation imposed by section 271 would bring an end to the vigorous competition that exists in the market today. On the contrary, all available evidence shows that removing unbundling obligations only further increases competitive intensity by providing greater certainty. In the time since the Commission announced its decision to eliminate unbundling requirements for broadband, prices have substantially decreased while output (*i.e.*, subscribership) has steadily increased. As Verizon has demonstrated, Verizon itself and

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[20] Yankee Group, *Cable and DSL Battle for Broadband Dominance* at 4-5 (Feb. 2004) ("*Feb. 2004 Yankee Group Study*").

other local telephone companies have cut their national DSL prices considerably, increased the speed of their basic DSL offerings, and introduced new service offerings. This, in turn, has prompted cable companies to begin offering promotional and targeted price reductions and to increase the data speeds of their service offerings, effectively offering consumers more bandwidth at a lower price than those operators' previous offerings. *March 2004 Broadband Update* at 7, Table 4. These price reductions have led to rapid subscriber growth.[21] Indeed, one of the analysts that AT&T itself cites finds that, "thanks to price-cutting, DSL made modest inroads into cable's dominant position in the U.S. market."[22] Based on these developments, other Wall Street analysts have recently increased their estimates of subscriber growth for the rest of 2004.[23]

AT&T nonetheless accuses Verizon of "making up the facts" in observing that national DSL prices have fallen, claiming that Verizon's timeline of price reductions "conspicuously stops at the end of 2003."[24] But the very table that AT&T cites includes

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[21] *See, e.g., Apr. 2004 Bernstein Broadband Update* at 4 ("DSL's market share gain of *gross* additions . . . reflects its lower pricing as introduced in May 2003, coupled with a narrowing of cable's historical availability advantage.").

[22] G. Campbell et all, Merrill Lynch, *Everything over IP* at 2 (Mar. 12, 2004); *see* AT&T *Ex Parte* at 7 n.35 (citing same).

[23] *See, e.g., Apr. 2004 Bernstein Broadband Update* at 3 ("With full-year 2003 results now reported for the large broadband service providers, we have revisited our broadband subscriber penetration estimates and net add forecasts. . . . We continue to view the opportunity for consumer cable modem and DSL services to be larger, faster growing and more stable than commonly believed.").

[24] AT&T *Ex Parte* at 6. Ironically, it is AT&T that is stuck in the past. As recently as two months ago, AT&T was still citing three-year old data to support its claim that the Bell companies implemented "DSL price hikes that were unmatched by cable companies." *See Ex Parte* Letter from David L. Lawson, Sidley Austin Brown & Wood LLP, to Marlene H. Dortch, Secretary FCC, CC Docket No. 01-337, at 7 (Feb. 20, 2004) (citing March 2002 Willig declaration in CC Docket No. 01-337, which relied on data

developments from January and February 2004. *March 2004 Broadband Update* at 7, Table 4. And while AT&T claims that Verizon and other local telephone companies have more recently raised their DSL prices, that claim is simply wrong. AT&T is referring to the decision that Verizon and other local telephone companies made to begin passing through the 10-percent contribution that the Commission forces local telephone companies—but, anomalously, *not* cable modem providers[25]—to make to the Universal Service Fund for each broadband connection. AT&T *Ex Parte* at 6-7. Verizon previously absorbed this cost itself while the Commission decided whether to eliminate this requirement or to require cable companies to make the same contribution. But given that the Commission has not yet addressed the issue, Verizon could not continue indefinitely to absorb a cost that the largest competitor in the market is not forced to incur. This is no more of a price increase than an ordinary pass-through of a sales tax. And, even with these new, asymmetrically-imposed regulatory fees, average DSL prices are below average cable modem prices, even though cable modem providers still have no contribution obligation at all.[26] Moreover, analysts believe that "DSL prices are still headed down, not up." *Goldman Cable Telephony Report* at 19. AT&T also tries to

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from 2001). As Verizon has demonstrated, that claim was wrong even when it was first made, and does not even pass the straight-face test today. *See* Reply Declaration of Dennis W. Carlton, Hal S. Sider, and Gustavo Bamberger, ¶¶ 17-18, included as Exhibit A to Reply Comment of Verizon, CC Docket No. 01-337 (Apr. 22, 2002).

[25] *See, e.g.*, Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3054 ¶¶ 79-80 (2002) ("*Wireline Broadband NPRM*").

[26] *See, e.g.,* F. Governali, *et al.*, Goldman Sachs, *Cable Telephony/VoIP Threat Evolves, But Shouldn't Be Catastrophic*, at 23, Exhibit 19 (Apr. 16, 2004) ("*Goldman Cable Telephony Report*"); J. Halpern, *et al.*, *Dissecting RBOC Pricing for Consumer DSL Services*, Bernstein Research at 8, Exhibit 6 (Mar. 2004).

characterize as a price increase the fact that SBC allowed one of its limited-time promotions to lapse.[27] But on April 27, 2004, SBC reinstated this promotional rate.[28] SBC has recently lowered the monthly price for other DSL offerings as well.[29]

AT&T's claim of duopoly is further belied by recent evidence regarding the rise of other broadband technologies, such as 3G mobile wireless, fixed wireless, BPL and satellite. As Verizon has shown, recent evidence confirms that the availability and use of these technologies is steadily increasing. *March 2004 Broadband Update* at 13-24. AT&T's only response is to focus on the current number of subscribers for these technologies, even though AT&T has acknowledged in other contexts that the proper focus should be on "'availability' of competitive alternatives."[30] This is particularly true for a nascent market like broadband, where even the more established technologies, such as cable and DSL, still maintain only a small percentage (less than a quarter) of the total potential customer base.

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[27] *See* AT&T *Ex Parte* at 6 (citing dslprime.com and Merrill Lynch); *but see* G. Mannes, *Cable Fans Cheer SBC Broadband Shift*, TheStreet.com (Feb. 3, 2004) (SBC has restored the "prepromotion" price, "closing out a promotion that began last October").

[28] *See* SBC Press Release, *SBC Yahoo! DSL Returns To Best-Ever Price Of $26.95 A Month For High Speed Internet Service* (Apr. 27, 2004) (reinstating promotion of $26.95 per month for download speeds of up to 1.5 Mbps).

[29] *See* SBC Press Release, *SBC Communications Launches New Higher Speed SBC Yahoo! DSL At Attractive Low Prices* (Apr. 1, 2004) (reducing price for 3.0 Mbps/384 kbps service that was introduced in February to $36.99 when purchased with local, long-distance, and wireless service).

[30] Comments of AT&T Corp., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, at 2, MB Docket No. 02-145 (July 29, 2002).

In all events, it would be arbitrary and capricious to regulate the second-place, non-dominant DSL providers more than the cable companies, with their significantly larger market shares. Indeed, that is the central message that the D.C. Circuit has sent the Commission on the need to eliminate asymmetrical unbundling obligations imposed only on DSL providers and not their cable modem rivals.[31]

AT&T's tired claim that "continued unbundling of broadband loops is necessary to protect competition for consumers that increasingly demand *bundles* of voice and data services," AT&T *Ex Parte* at 7, fails on several levels. First, the premise of the Commission's entire broadband analysis in the *Triennial Review Order* was that the relevant market, for purposes of assessing the need for any unbundling of broadband-specific elements, is the *broadband market*. *See, e.g., Triennial Review Order* ¶¶ 211-13, 292.[32] That, too, was the premise of the D.C. Circuit's decision upholding that analysis. *See USTA II*, 359 F.3d at 578-85.

Second, there is already very substantial intermodal competition in the "market" for bundled voice and data services. AT&T makes the remarkable claim that "[m]ost cable facilities do not currently have voice capabilities (and thus could not even theoretically be used by competitive carriers to offer voice and data services)." AT&T *Ex Parte* at 2. But, as AT&T knows better than anyone, whether a cable operator itself

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[31] *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428-29 (2002) ("*USTA I*") (invalidating line-sharing mandate in light of "the robust competition, and the dominance of cable, in the broadband market"); *USTA II*, 359 F.3d at 585 (upholding elimination of broadband unbundling obligations because (inter alia) "intermodal competition from cable ensures the persistence of substantial competition in broadband").

[32] *See also* Verizon *Ex Parte* at 2 n.5.

implements voice capabilities on its network is irrelevant to whether that network can be used to provide VoIP applications. Cable companies do not need to "roll out" voice telephony services before their customers may use a cable modem platform to run VoIP applications. Any consumer with a cable modem or other broadband connection can use that broadband connection along with a service provided by Vonage or any other VoIP provider and, for as little as $15 per month, place telephone calls to anyone on the PSTN.[33]

Today, a number of competitive providers—*including AT&T itself*—are offering IP-based voice services over cable broadband connections, which are now available to more than 85 percent of all homes. *March 2004 Broadband Update* at 8. AT&T has already begun providing service "in 19 metropolitan markets" and plans to expand "to 100 major markets by year's end."[34] Time Warner has announced that it will deploy VoIP service "in most, if not all, of [its] markets" by the end of 2004.[35] Cablevision already offers voice telephone service using VoIP to 100 percent of its 4.4 million cable homes passed in metropolitan New York and New Jersey.[36] Time Warner has already deployed VoIP in seven of its markets, and is "on track" to deploy service to "essentially all" of its cable systems—which pass a total of 18 million homes—"by the end of

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[33] *See* https://subscribe.vonage.com/vonage-subscribe/subscribe/Default.do (offering the "Vonage Basic 500 Plan" for $14.99 per month, which entitles subscribers to "500 minutes of US nationwide long distance, local, regional, plus calls to Canada every month" and "[o]nly 3.9¢ per minute after the first 500 monthly minutes").

[34] AT&T News Release, *AT&T's CallVantage Service Expands to Boston Area* (Apr. 26, 2004).

[35] M. Richtel, *Time Warner to Use Cable Lines to Add Phone to Internet Service*, NY Times (Dec. 9, 2003).

[36] *March 2004 Broadband Update* at 13 & Table 5.

2004."[37] Comcast already offers circuit-switched voice service to more than 9 million homes and has told analysts it will have half of its 39 million homes passed "VoIP ready" by year-end 2004 and 95-percent VoIP ready by year-end 2005.[38] Cox already offers circuit-switched voice service to more than 5 half of the 10 million homes it passes, just extended that service to Northern Virginia, and has begun rolling out VoIP service in at least one other market.[39] Charter plans to offer VoIP services to at least one million of the 12 million homes it passes in 2004.[40] In addition, Vonage already serves at least 135,000 subscribers, and is adding "more than 20,000 lines per month to its network."[41]

Finally, AT&T argues that VoIP is irrelevant to the analysis "so long as the Bells believe that they are free to disconnect the DSL service of any consumer that chooses an alternative voice provider." AT&T *Ex Parte* at 8. This is a complete non-sequitur, because it absurdly assumes that ILECs face no competition in the provision of broadband services. But consumers already are using alternative broadband platforms (*i.e.*, cable modem) and running VoIP applications over them. Nor is there any need for speculation on this point. For example, Vonage reports that 70 percent of its subscribers

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[37] Time Warner News Release, *Time Warner Reports First Quarter 2004 Results* (Apr. 28, 2004).

[38] John R. Alchin, Executive Vice President and Co-CFO, Comcast, Presentation to Bear Stearns Media, Entertainment and Information Conference at 16 (Mar. 9, 2004), http://media.corporate-ir.net/media_files/irol/11/118591/presentations/cmcsa_030904/sld001.htm.

[39] Cox News Release, *Cox Communications Brings Digital Telephone Service to Northern Virginia; Northern Virginia Marks Cox's 13th Telephone Market* (Apr. 30, 2004); *March 2004 Broadband Update* at 13 & Table 5.

[40] G. Campbell, *et al.*, Merrill Lynch, *Everything over IP* at 17, 52 (Mar. 12, 2004).

[41] Vonage Press Release, *Vonage Launches Service in Halifax, Canada* (Apr. 30, 2004).

use cable. *March 2004 Broadband Update* at 12 & n.58. As AT&T's own chairman has recently stated in connection with that company's plan to deploy voice-over-broadband services in the 100 largest markets across the country, "[w]e don't have a broadband availability issue in America."[42] For this reason, at least one analyst has observed that cable VoIP telephony presents "the largest risk to Bell fundamentals over the next 5 years."[43]

For all of these reasons, and those presented in Verizon's previous submissions, the petition for forbearance should be granted.

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[42] *Q4 2003 AT&T Earnings Conference Call – Final*, FD (Fair Disclosure) Wire, Transcript 012204ar.735 (Jan. 22, 2004) (AT&T Chairman and CEO David Dorman).

[43] J. Hodulik, *et al.*, UBS, *Cable Telephony Competitioin: Who Gets It?* At 1 (Aug. 7, 2003).